

1 Tyler J. Woods (SBN 232464)
twoods@trialnewport.com
2 Richard H. Hikida (SBN 196149)
rhikida@trialnewport.com
3 Scott J. Ferrell (SBN 202091)
sferrell@trialnewport.com
4 NEWPORT TRIAL GROUP
5 4100 Newport Place, Suite 800
Newport Beach, CA 92660
6 Telephone: (949) 706-6464
7 Facsimile: (949) 706-6469

8 Attorneys for Plaintiff
THERMOLIFE INTERNATIONAL, LLC
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10 **UNITED STATES DISTRICT COURT**

11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 THERMOLIFE INTERNATIONAL,
LLC,

13 Plaintiff,

14 vs.

15 MYOGENIX CORP., et al.

16 Defendants.
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Case Nos.:

13-cv-651 JLS (MDD);
13-cv-652 JLS (MDD);
13-cv-653 JLS (MDD);
13-cv-825 JLS (MDD);
13-cv-826 JLS (MDD);
13-cv-827 JLS (MDD);
13-cv-830 JLS (MDD);
13-cv-881 JLS (MDD);
13-cv-883 JLS (MDD);
13-cv-885 JLS (MDD);
13-cv-886 JLS (MDD);
13-cv-887 JLS (MDD);
13-cv-888 JLS (MDD);
13-cv-890 JLS (MDD);
13-cv-906 JLS (MDD);
13-cv-907 JLS (MDD);
13-cv-908 JLS (MDD);
13-cv-910 JLS (MDD);
13-cv-911 JLS (MDD);
13-cv-913 JLS (MDD);
13-cv-914 JLS (MDD);
13-cv-1015 JLS (MDD)

**PLAINTIFF AND DEFENDANTS
JOINT RESPONSE TO JULY 19,
2013 ORDER TO SHOW CAUSE
WHY THESE CASES SHOULD BE
CONSOLIDATED FOR PRETRIAL
PURPOSES UP TO AND
INCLUDING CLAIM
CONSTRUCTION**

AND RELATED CASES

1 Plaintiff Thermolife International, LLC and the undersigned Defendants hereby
2 jointly respond to the Court's July 19, 2013 Order To Show Cause Why These Cases
3 Should Not Be Consolidated For Pretrial Purposes Up to Including Claim
4 Construction ("Order to Show Cause").

5 **I. PLAINTIFF AND UNDERSIGNED DEFENDANTS AGREE**
6 **THAT CONSOLIDATION IS APPROPRIATE.**

7 Plaintiff and the Defendants have conferred regarding the desirability of
8 consolidating all of the cases identified in the Court's Order to Show Cause. Plaintiff
9 and the undersigned Defendants agree that each of the identified cases should be
10 consolidated for pretrial purposes pursuant to Federal Rule of Civil Procedure 42(a)
11 and request that the Court issue an order formally consolidating the cases with the
12 lead case for pretrial purposes.

13 **II. LIAISON COUNSEL**

14 The Court has requested Defendants to appoint liaison counsel. Counsel of
15 record from Venable LLP, including Daniel S. Silverman, and Arnold & Porter LLP,
16 including Monty Agarwal, will serve as liaison counsel. To avoid the potential for
17 future controversy relating to ambiguities over the role of liaison counsel, the
18 designated counsel requests the court specify liaison counsel's function in any
19 consolidated action. The designated counsel believe that their role should be limited
20 to essentially administrative matters, such as communications between the court and
21 other counsel (including receiving and distributing notices, orders, motions, and
22 briefs on behalf of the group), convening meetings of counsel, advising parties of
23 developments, and otherwise assisting in the coordination of activities and positions.

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1 **II. PLAINTIFF AND UNDERSIGNED DEFENDANTS REQUEST**
2 **THAT THE COURT PHASE THE CASE AND CONSOLIDATE**
3 **THE CASES FOR PRETRIAL REGARDING INVALIDITY AND**
4 **UNENFORCEABILITY, NOT JUST CLAIM CONSTRUCTION.**

5 The Court's Order to Show Cause proposed to consolidate the cases up to and
6 including claim construction. Plaintiff and the Defendants have also conferred
7 regarding the desirability of additionally phasing and consolidating the cases up to
8 and including pretrial matters regarding invalidity and/or unenforceability issues.

9 As the Court's Order to Show Cause recognized, Thermolife has alleged
10 similar infringement claims based on four patents. Defendants also believe that each
11 case involves common issues related to the invalidity and unenforceability of these
12 four patents. Although not all Defendants have responded to and/or answered
13 Thermolife's complaints to date, those Defendants that have responded have each
14 pled affirmative defenses and/or counterclaims seeking to invalidate each of the four
15 patents and/or an order declaring one or more of the four patents unenforceable on
16 grounds, for instance, of inequitable conduct. Defendants expect that all cases will
ultimately raise similar issues.

17 In light of the Defendants' invalidity and/or unenforceability defenses, Plaintiff
18 and Defendants believe, subject to the Court's desire, that the cases and discovery can
19 and should be phased and coordinated to include claim construction, patent invalidity
20 and/or unenforceability, including inequitable conduct. Specifically, during the first
21 phase, Plaintiff and Defendants propose to conduct discovery as to issues that are
22 common to all cases, namely claim construction, invalidity and unenforceability,
23 including inequitable conduct. Following this first phase of discovery, the parties
24 will present, first, any claim construction disputes to the Court. Defendants then
25 anticipate bringing a motion for summary judgment of invalidity and/or
26 unenforceability. Once the Court has had an opportunity to decide any claim
27 construction and invalidity and/or unenforceability disputes, if necessary, the cases
28 would proceed through a second phase of discovery covering issues such as

1 infringement and damages that do not merit consolidation because they are likely to
2 be unique to each Defendant. Trials would not be consolidated.

3 Plaintiff and Defendants believe the proposed phasing and consolidation of
4 common issues for pretrial purposes will facilitate the fair and efficient conduct of
5 discovery and dispositive motion practice in the consolidated matters, will alleviate
6 the burden of excessive and potentially unnecessary discovery, and also will allow
7 the court to hear issues that are common to all cases in a coordinated matter.

8 At this stage, the Court has not scheduled an initial case management
9 conference to set a schedule for the cases, including for any phasing the Court may
10 adopt. However, in light of the Court's interest in consolidation for pretrial purposes,
11 the parties are amenable to phasing and consolidation as proposed above. The parties
12 expect to provide specific proposal for scheduling and for coordinating discovery to
13 implement the proposed phasing and consolidation in a Rule 26(f) statement.

14
15 Dated: August 19, 2013

NEWPORT TRIAL GROUP

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18 By: /s/ Tyler J. Woods
Tyler J. Woods
Attorneys for Plaintiff

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20 THERMOLIFE INTERNATIONAL LLC
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1 Dated: August 19, 2013

ARNOLD & PORTER LLP

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4 By: /s/ Monty Agarwal
Monty Agarwal
Attorneys for Defendants and
Counterclaimants

6 KINGFISHER MEDIA, LLC
7 (Case No. 13-cv-913 JLS (MDD))

8 ULTIMATE NUTRITION, INC.
9 (Case No. 13-cv-914 JLS (MDD))

10 Dated: August 19, 2013

BURCH DALLMANN LLP

11
12
13 By: /s/ Andrew Dallmann
Andrew S. Dallmann
14 Attorneys for Defendant and
Counterclaimant

15 GASPARI NUTRITION, INC.
16 (Case No. 13-cv-881 JLS (MDD))

17 Dated: August 19, 2013

FELDMAN GALE, P.A.

18
19
20 By: /s/ Todd Malynn
Todd Malynn
21 Attorneys for Defendant and
22 Counterclaimant

23 HI-TECH PHARMACEUTICALS, INC.
24 (Case No. 13-cv-830 JLS (MDD))

1 Dated: August 19, 2013

GOODWIN PROCTER LLP

2
3
4 By: /s/ Kurt Kjelland
Kurt J. Kjelland
Attorney for Defendant and Counterclaimant

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6 DYMATIZE ENTERPRISES, LLC
(Case No. 13-cv- 888 JLS (MDD))
7

8 Dated: August 19, 2013

LAW OFFICES OF RICHARD ELLIOTT

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10
11 By: /s/ Richard Elliott
Richard J. Elliott
Attorneys for Defendant and
Counterclaimant

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13
14 iSATORI, INC.
(Case No. 13-cv-911 JLS (MDD))
15

16 Dated: August 19, 2013

NOVAK DRUCE CONNOLLY BOVE
+ QUIGG LLP

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19 By: /s/ Francis DiGiovanni
Attorneys for Defendant

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21 VITAL PHARMACEUTICALS, INC.
(Case No. 13-cv-1015 JLS (MDD))
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1 Dated: August 19, 2013

VENABLE LLP

2
3 By: /s/ Daniel Silverman

4 Daniel Silverman
5 Attorneys for Defendants and
Counterclaimants

6 SNAC SYSTEM, INC.
7 (Case No. 13-cv-825 JLS (MDD))

8 MAXIMUM HUMAN PERFORMANCE,
9 LLC
(Case No. 13-cv-883 JLS (MDD))

10 FORCE FACTOR, LLC
(Case No. 13-cv-907 JLS (MDD))

11 BIO-ENGINEERED SUPPLEMENTS &
12 NUTRITION, INC., AMERICAN BODY
13 BUILDING PRODUCTS, LLC a/k/a ABB
PERFORMANCE, LLC and OPTIMUM
NUTRITION, INC.
(Case No. 13-cv-908 JLS (MDD))

14 BPI SPORTS HOLDINGS, LLC and
15 IMAGE SPORTS, LLC
(Case No. 13-cv-910 JLS (MDD))

16 NUTREX RESEARCH, INC.
17 (Case No. 13-cv-885 JLS (MDD))

18 Dated: August 19, 2013

KARISH & BJORGUM PC

19
20
21 By: /s/ Marc Karish

22 Attorneys for Defendants and
Counterclaimants

23 NATROL, INC.
24 (Case No. 13-cv-826 JLS (MDD))

25 SAN NUTRITION CORP.
(Case No. 13-cv-827 JLS (MDD))

1 Dated: August 19, 2013

HOPENFELD SINGER RICE & SAITO
LLP

2
3
4 By: /s/ Benjamin Singer

5 Benjamin L. Singer
6 Attorneys for Defendants

7 MYOGENIX CORP., GNC
8 CORPORATION; GENERAL
9 NUTRITION CENTERS, INC.; and
10 GENERAL NUTRITION
11 CORPORATION
(Case No. 13-cv-651JLS (MDD))

12 NBTY, INC. and
13 VITAMIN WORLD, INC.
(Case No. 13-cv-886 JLS (MDD))

14 SOLGAR, INC.
(Case No. 13-cv-890 JLS (MDD))

15 UNITED STATES NUTRITION,
16 INC.
(Case No. 13-cv-906 JLS (MDD))

17 Dated: August 19, 2013

18 STETINA BRUNDA GARRED &
19 BRUCKER

20 By: /s/ Bruce Brunda

21 Bruce B. Brunda
22 Attorneys for Defendant and
23 Counterclaimant

24 Joe Wells Enterprises, Inc.
25 a California corporation, dba Max
26 Muscle Sports Nutrition
27 (Case No. 13-cv-652 JLS (MDD))
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/s/Tyler J Woods
Tyler J Woods

Tyler J Woods